A. W. JOSUE

IBLA 80-403 Decided June 16, 1980

Appeal from decision of the Idaho State Office, Bureau of Land Management, rejecting the Miller Mountain No. 1 and Miller Mountain No. 2 mining claims. IMC 8190-8191.

Affirmed as modified.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to hold Mining Claim -- Mining Claims: Assessment Work -- Mining Claims: Recordation

   Pursuant to 43 CFR 3833.2-1(a) the owner of an unpatented mining claim located on or before Oct. 21, 1976, must have filed in the proper Bureau of Land Management office on or before Oct. 22, 1979, or on or before Dec. 30 of each calendar year following the calendar year of such recording, whichever date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim. Where a mining claim is located on Aug. 20, 1970, and recorded with BLM on Nov. 14, 1978, the evidence of assessment work must be filed with BLM on or before Oct. 22, 1979. Where evidence of assessment work is not filed, the claim is conclusively deemed abandoned and void pursuant to 43 U.S.C. § 1744(c) (1976) and 43 CFR 3833.4(a).

APPEARANCES: A. W. Josue, pro se.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

The February 7, 1980, decision of the Idaho State Office, Bureau of Land Management (BLM), "rejected" appellant's mining claims for

failure to file on or before October 22, 1979, evidence of assessment wor or a notice of intention to hold the claims as required by 43 CFR 3833.2. The two unpatented mining claims, designated Miller Mountain Nos. 1 and 2 and identified by BLM serial numbers IMC 8190 and IMC 8191, were located August 20, 1970, by appellant. 1/ Appellant filed a copy of the notice o location of each claim with BLM on November 14, 1978.

Appellant appeals the decision on the following grounds: (1) he was not given sufficient notice of the recording requirements; (2) he was tol by the county recorder that it was not necessary to record with BLM; (3) the claims are not "nuisance" claims and provide a large part of his livelihood; (4) he has given an option to sell the claims and BLM's actio places him in a position of selling claims he does not own; and (5) he wa deprived of his property without due process.

[1] The pertinent regulation, 43 CFR 3833.2-1(a), implementing sectio 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA) provides as follows:

> § 3833.2-1 When filing is required.
>
> (a) The owner of an unpatented mining claim located on Federal lands on or before October 21, 1976, shall file in the proper BLM office on or before October 22, 1979, or on or before December 30 of each calendar year following the calendar year of such recording, which ever date is sooner, evidence of annual assessment work performed during the preceding assessment year or a notice of intention to hold the mining claim.

Appellant's mining claims were located on August 20, 1970, and recorded with BLM on November 14, 1978; therefore, evidence of annual assessment work must have been filed on or before October 22, 1979. Failure to file the evidence of annual assessment work is deemed conclusively to constitu an abandonment of the mining claim. 43 U.S.C. § 1744(c) (1976), 43 CFR 3833.4. The BLM decision should have declared the claims abandoned and void. The failure to use the

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1/ The files for the Miller Mountain Nos. 3 and 4 mining claims (IMC 819 and IMC 8193) were also transmitted to this Board by BLM. These two clai were located by appellant on November 1, 1978. By letter of October 4, 1979, BLM was notified that the Miller Mountain Nos. 3 and 4 claims were sold to Albert Applegath. Subsequently, BLM issued a decision rejecting the claims for failure to comply with 43 CFR 3833.2. The decision was mailed to Albert Applegath, the new owner. Notices of appeal were not filed and appellant does not mention these claims. Therefore, those decisions have become final.

precise technical terms is a harmless error and did not prejudice appellant. The decision is modified to show clearly the statutory consequence.

Appellant's reasons on appeal do not provide justification for failu to comply with the mandatory requirements of FLPMA. FLPMA does not provi BLM or the Interior Board of Land Appeals with discretion to waive the effects of failure to comply with the recordation requirements.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appeal from is affirmed as modified herein by our declaring that the mining clai are abandoned and void.

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Joan B. Thompson
Administrative Judge

I concur:

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Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE FISHMAN CONCURRING SPECIALLY:

Appellant complains of having been denied "due process" in the adjudication in the State Office. Cf. Goldberg v. Kelly, 397 U.S. 254 (1970). Presumably he adverts to the fact that he was not offered an opportunity for a hearing.

In the case at bar, there are no undisputed facts. The issue is the legal conclusions to be drawn therefrom. In such circumstances, no usefu purpose would be served by a hearing and due process does not require tha the aggrieved party be afforded the opportunity for a hearing. Peter Panruk, 43 IBLA 69 (1979); Floyd L. Anderson, Sr., 41 IBLA 280, 86 I.D. 3 (1979).

Gellhorn and Byse, in their case book on Administrative Law (1970), treat the question as follows at page 499:

> A hearing to take evidence as is done in a trial at law is an obviously silly waste of time if facts are not in dispute. The courts, in their own proceedings, rule on motions to dismiss (or whatever may be the local equivalent of a demurrer); when they do so, they assume a set of facts, without receiving and passing upon evidence, and then decide whether the assumed facts add up to something or to nothing. The courts also enter summary judgments when the factual allegations of a party have not been materially controverted by his opponent. Trial hearings may permissibly be omitted in administrative proceedings at least as readily as in their judicial counterparts, when the only things to be determined are the legal consequences of uncontested facts. See, e.g., Persian Gulf Outward Freight Conference v. Federal Maritime Commission, 375 F.2d 335 (D.C. Cir. 1967); Birkenfield v. United States, 369 F.2d 491 (3d Cir. 1966); Railway Express Agency, Inc. v. Civil Aeronautics Board, 345 F.2d 445 (D.C. Cir.), cert. denied 382 U.S. 879 (1965); National Labor Relations Board v. Simplot Co., 322 F.2d 170 (9th Cir. 1963); Joe L. Smith, Jr., Inc., 1 F.C.C.2d 666 (1965); but cf. Kirby v. Shaw, 358 F.2d 446 (9th Cir. 1966). [Emphasis supplied.]

I believe appellant was not denied due process. Cf. Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976); and Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978). But see Fox v. Morton, 505 F.2d 254 (9th Cir. 1974).

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Frederick Fishman
Administrative Judge